IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cri. Appeal No. 361 of 2000

Reserved on : 31st August, 2007

Date of Decision: 11th September, 2007

State of H.P.		Appellant
	Versus	
Jai Dev and others		Respondents

Coram

The Hon'ble Mr. Justice Sanjay Karol,J.

Whether approved for reporting[1]? Yes.

For the appellant: Mr.M.A.Khan, Addl. Advocate General.

For the respondents: Mr.Ajay Kochhar, Advocate, for respondents No.1 and 2.

Mr.G.D.Verma, Sr. Advocate, with Sh.Romesh Verma, Advocate, for respondent No.3 to 5.

Sanjay Karol, J.

The present appeal arises out of order of acquittal passed by Judicial Magistrate, Ist class (II), Shimla, in Criminal Case No. 16/2 of 93, titled as State vs. Jai Dev, acquitting the accused persons of an offence punishable under Section 379, IPC and Section 33 of the Indian Forest Act.

The case of prosecution as set out is that on 29.12.1991, HC Anant Ram (PW-11) alongwith HC Balak Ram, Bhuri Ram and C. Bhagwan Dass were on Nakka duty, vide Rapat No. 13, on Shimla – Bilaspur road, when at about 11.45 p.m. in the night they found accused Jai Dev and Kailesh Chand loading scants of wood in vehicle No.

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[1] Whether the reporters of Local Papers are allowed to see the Judgment?

DL-1L-1404 and other accused persons were throwing scants of wood from the upper side of the road. On seeing the police party the other accused persons fled away and Jai Dev and Kailesh Chand were arrested on the spot. Two independent witnesses, namely, Ramesh Panth (PW-1) and Chet Ram (PW-4) were called to the spot and the possession of the vehicle as also the timber was taken into possession vide memo (Ext.PW-1/A). Investigating Officer Anant Ram (PW-11) sent Rukka (Ext.PW-10/A) for registration of FIR dated 30.12.1991 (Ext.PW-10/B), registered under Sections 379, IPC and 32 of the Indian Forest Act with Police Station Dhalli. The investigation was carried out and the statements of the witnesses were recorded. During investigation demarcation report (Ext.PW-9/B) was obtained and spot map (Ext.PW-11/A) prepared.

After conclusion of investigation, challan was presented in the Court for trial. In due compliance of provisions of Section 207, Cr.P.C., copies were supplied to the accused persons. All the accused persons were charged on 6.12.1994 for offence punishable under Section 379, IPC and Section 34, Indian Forest Act, to which they did not plead guilty and consequently the matter was put to trial.

During the course of trial, prosecution led 11 witnesses, namely, Ramesh Panth (PW-1), Balak Ram (PW-2), Bhuri Singh (PW-3), Chet Ram (PW-4), Prem Lal (PW-5), Lal Chand (PW-6), Bhupinder Pal (Pw-7), Shyam Singh (Pw-8), T.C.Behal (PW-9), Keshav Ram (PW-10) and Anant Ram (PW-11). Out of the aforesaid witnesses PW-2, PW-3 and PW-11 constituted the policy party, who encountered the accused persons on the night of the incident. PW-1, PW-4 and PW-5 are the material independent eye witnesses on whose statements the

prosecution case rests. PW-9 is the Tehsildar who has carried out the demarcation and prepared demarcation report.

After considering the entire material on record, Court below acquitted the accused persons primarily on two grounds: (i) there were major contradictions in the statements of the witnesses, therefore, their testimony is unworthy of credence and (ii) the prosecution had suppressed the material evidence inasmuch as rapat rojnamcha No. 13 showing the movement of the police party was not produced but concealed.

Learned counsel for the appellant has assailed the judgment on the ground that reasoning given by the Court below is perverse and the Court has wrongly disbelieved the version of the eye witnesses and case of the prosecution.

Per contra, learned counsel for the respondents have supported the decision, inter alia, stating that (i) the judgment of the Court below is well reasoned and the findings are based on correct appreciation of facts and material on record; (ii) essential ingredients to constitute an offence under Section 33 of Indian Forest Act are missing; (iii) in any event to constitute an offence of theft the prosecution has miserably failed to show that alleged timber was stolen from the forest land or that the accused persons were involved with the commission of offence; (iv) material evidence i.e. witnesses and (v) documents have been concealed and suppressed by the prosecution; demarcation report (Ext.PW-9/B) has not been prepared in accordance with law and has relied upon the decision of this Court in *State of H.P. vs. Laxmi Nand and others,* reported in 1992(2) Sim. L.C. 307 and that there are material contradictions in the statements of the witnesses.

In order to appreciate the issues before the Court, it is necessary to reiterate the principles of law enunciated by the Apex Court, which are required to be followed by the High Court in exercise of its appellate power under Section 378, Cr.P.C.

In *Barati vs. State of U.P.,* reported in (1974) 4 SCC 258, the Court held that while exercising the power and before reaching its conclusion upon fact the High Court should give proper weight and consideration to such matters as (1) the view of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial (3) the right of the accused to the benefit of any real and reasonable doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witness.

In *Akoijam Ranbir Singh vs. The Government of Manipur*, reported in (1976) 3 SCC 465, the Court reiterated the principles to state that merely because there is another view possible and where there is no serious infirmity in trial Court's appreciation of evidence, the High Court should not interfere in the case of acquittal.

In *Ramji Surjya Padvi and another* vs. *State of Maharashtra*, reported in (1983) 3 SCC 629, the Court held that while the jurisdiction of an appellate court is coextensive with that of the trial Court in the case of an appeal against a judgment of acquittal it cannot totally brush aside the appreciation of the evidence by the trial court. The reasons for reversing a judgment of acquittal should be cogent and if two views are reasonably possible, the appellate court should be slow in interfering with the judgment of the trial court, even if it is possible for it to take a different view after a process of laborious reasoning.

In *Awadhesh and another vs. State of Madhya Pradesh*, reported in (1988) 2 SCC 557, the Court held that as a rule of prudence the High Court should not disturb the order of acquittal unless the conclusions of the trial Court on the evidence on record are found to be unreasonable, perverse or unsustainable.

In *Chandrappa and others vs. State of Karnataka,* 2007 (2) SCC Cri. 325, the Apex Court has laid down the following principles to be kept in mind by the Appellate Court in deciding the appeal against an order of acquittal:-

> "An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court."

Keeping in view the aforesaid principles of law, I proceed to examine the material on record.

Investigating Officer ASI Anant Ram (PW-11) has deposed that he alongwith Balak Ram (PW-2) and Bhagwan Dass were on excise raid duty vide rapat No.13 and at about 11.45 p.m. they reached near Range Office, (Forest) Dhami, where they found accused Jai Dev and Kailash Chand loading scants of wood in vehicle DL-1L-1404 and the other accused persons who were on the upper side of the road and were throwing the scants of wood down on the road on seeing the Police Party fled away. Jai Dev and Kailash Chand were, however, arrested at site. Balak Ram (PW-2) and Bhagwan Dass (not a witness)

were sent by him to call Ramesh Panth (PW-1) and Chet Ram (PW-4) and they both came to the spot. In all four trees were cut in the jungle and about 15 quintals of wood (scants) was lying both inside and outside the vehicle. Both PW-1 and PW-4 witnessed the seizure memo Ext.PW-1/A. He sent Rukka (Ext.PW-10/A) on the basis of which FIR (Ext. PW-10/B) bearing No. 434/91 dated 29.12.1991 was registered with Police Station, Dhalli. He also prepared spot map (Ext.PW-11/A) and recorded the statements of witnesses and completed the investigation. In cross-examination he has admitted that he has not brought on record rapat Roznamcha No.13 on the basis of which the police party had proceeded to put Nakka in excise case. He does not even remember the name of the forest or the class and size of the trees felled and did not consult an expert. This witness has admitted that it was so dark that it was difficult to identify a person. He has denied the suggestion that he was not in good terms with accused Narinder, as his request to give one motorcycle tyre was refused. He has deposed that there was no residential house within a distance of 1 ½ kms. from the site of incident and the police party went on foot to call the independent witnesses from there. He could not deny or confirm that accused Ram Lal and Narinder were on election duty between 29.12.1991 and 4.1.1992. This is the evidence of prosecution.

In contradiction Ramesh Panth (PW-1), however, has deposed that it was Anant Ram (PW-11) who had come to call him at his house with whom he went to the site where he found accused Jai Dev, his younger brother and Kailash Chand alongside vehicle DCM Toyota. Jai Dev had informed them that the timber belonged to Narinder Kumar and Rup Lal.

The version of the aforesaid witness is at variance with other witnesses. The witnesses have not only contradicted each other but have also contradicted themselves in their statements, which is evident from the following:-

(i) PW-11 has deposed that he has sent Balak Ram (PW-2) and Bhagwan Dass to call for Ramesh Panth (PW-1) and Chet Ram (PW-4) from their residences, which is at a distance of 1 ½ km. away from the place of occurrence. Version of Ramesh Panth (PW-1), is at variance who has deposed that Anant Ram (PW-11) had himself visited his house and had asked him to accompany him to the place of occurrence and with whom he went to the site where he found accused Jai Dev, his younger brother and Kailash Chand. Bhagwan Dass has not been examined. Version of Balak Ram (PW-2) is also at variance with that of Anant Ram (PW-11), who deposed that it was Anant Ram (PW-11) who had gone to call the witnesses Ramesh Panth (PW-1) and Chet Ram (PW-4) and Bhuri Singh (PW-3) has corroborated the statement of PW-2.

(ii) There are major contradictions in the depositions of Anant Ram (PW-11), Ramesh Panth (PW-1), Bhuri Singh (PW-3) and Chet Ram (PW-4) on the date and timing of the incident. Whereas Anant Ram (PW-11) and Balak Ram (PW-2) have stated that they encountered the accused persons at about 11.45 p.m. in the night of 29.12.1991. However, Ramesh Panth (PW-1) has deposed that he was present at the site in between 5 and 6 p.m. in the evening. Importantly Chet Ram (PW-4) does not even mention the date of incident and has deposed that he was present in between 8 and 9 p.m. evening at the place of incident. Bhuri

Singh (PW-3) on the other hand has deposed that the incident has taken place at about 12.30 p.m.

(iii) PW-11 has deposed that when the accused persons were caught the timber scants were lying both in the vehicle and also on the road whereas as per the version of Chet Ram (PW-4), no timber scants were lying on the road.

(iv) As per Prem Lal (PW-5) timber was felled at the instance of accused persons, but in cross examination he has admitted that he did not cut any standing trees but had in fact cut the timber from rotten trees which had already fallen, required to be used as fuel wood in the office of Forest department.

(v) Both PW-3 and PW-11 have deposed that there were no houses in the vicinity of the place of incident; however, from spot map (Ext.PW-11/A) it is clear that there are houses in close vicinity of the place of incident.

(vi) As per Bhuri Singh PW-3 and PW-11 went on foot to call the witnesses PW-1 and PW-4, whereas PW-4 has deposed that they travelled upon the place of incident in Maruti Van and further PW-3 has deposed that he alongwith PW-4 and PW-11 came back on motorcycle.

(vii) As per the version of Anant Ram (PW-11) there were four stumps of freshly cut trees and version of PW-3 refers to only three stumps but PW-2 states that there were many stumps at the spot.

(viii) Anant Ram (PW-11) has deposed that he alongwith PW-2 and PW-3 and Bhagwan Dass was present at the time of occurrence, whereas PW-1 has contradicted this version of the witness and

deposed that amongst police persons only Anant Ram (PW-11) was present.

The aforesaid contradictions in the statements are material and raise a doubt of suspicion in the prosecution case. The Court below after examination the statements of the witnesses had come to the conclusion that the prosecution had miserably failed to prove their case against the accused persons beyond all reasonable doubt. The finding was based on the fact that there are major contradictions in the statements of the witnesses and the same cannot be relied upon. Their reliability is in doubt.

As has been rightly pointed out by the learned senior counsel for the accused persons the absence of Rapat Rojnamcha No.13 showing the authorization and movement of the police party who had gone on patrolling attains significance for the reason that presence of all the members of the police party is in doubt. At about 11.45 p.m. near the Forest Range office where guards are supposed to be there why they were not associated itself raises a doubt with regard to presence of the police party at the alleged place and time of occurrence. A suggestion has been put to PW-1 that there was animosity between the accused and him. Further Amar Singh (DW-1) has deposed that the accused Narinder Kumar, being a government employee was deputed at Dhamon in Panchayat election duty and was directed to be present at all times. Certificate Ext. D-1 has been produced to the said effect. It is not the case of the prosecution that said certificate is false/ concocted or that accused was not present at the relevant time at his place of election duty.

Independent witnesses Ramesh Panth (PW-1) and Chet Ram (PW-4) are residing at a place which was at a distance of 1 ½ kms

from the place of incident. Even though it has come on record that there were private houses and the quarters of Forest Guard and the Range office in the close vicinity, however, no officials of the Forest Department were associated or taken as witness. If the witnesses were handily and readily available then what was the need for the police party to have travelled on foot to call the witnesses at a distance of 1 ½ kms. and that too at mid night. This has not been explained and casts a doubt about the prosecution case.

Further my attention has been invited to the provisions of Section 33 of the Indian Forest Act. A bare perusal of Section 33 would show that the same is attracted only and only if the trees reserved under Section 30 of the said Act felled. Section 30 stipulates that the Government has to notify and declare the trees to be reserved and such notification has to be published under Section 31 of the Act. Faced with this submission, learned Addl. Advocate General, fairly stated that there is nothing on record to show that area in question had been notified in accordance with the provisions of Sections 30 and 31 of the Forest Act. In this view of the matter, the essential ingredients to constitute an offence under Section 33 of the Indian Forest Act not made out and the accused persons cannot be convicted at all for any violation thereof.

Apart from the aforesaid, in order to constitute an offence under Section 378, 379, IPC, it is important for the State to prove that the accused persons with dishonest intention had removed the timber from the government forest without its consent. It was imperative for the State to prove that the timber belonged to the Government and that it had been removed from the forest. It is important to point out that except for the statement of Prem Lal (PW-5) there is nothing on record to show that the timber belong to the Government had been cut from the

forest land adjoining range office Dhami. This witness, however, does not depose that the timber found on the road was the very same timber which had been felled from the land, which was got demarcated by the Investigating Officer. In fact he has stated that he had cut timber from rotten trees using the same as fuel wood in the office of the department. In fact a vain attempt has been made through the statement of T.C. Behal (PW-9), Tehsildar, to show that the land belonged to the Forest Department. He has simply exhibited demarcation report (Ext.PW-9/B). He does not state the procedure adopted for carrying out the demarcation. Demarcation report (Ext.PW-9/B) cannot be relied upon for two reasons, firstly that it is a photocopy and that too not signed by any person and secondly the same is incomplete as the Annexures alongwith report have not been placed on record. Therefore, in my view the prosecution has not placed on record the entire evidence to support its case. Why best of the evidence available with the prosecution to prove the guilt of the accused was not placed on record is intriguing. In *Laxmi Nand (supra)*, it has been held that if the procedure prescribed for carrying out the demarcation is not followed then no credence can be given to it.

Importantly, no witness on behalf of the Forest Department, who is owner and custodian of the timber, has come forward to depose that they were the owners of the timber and that the same was stolen and was removed away by the accused persons. In the absence of the same, it cannot be said that ingredients of theft have been proved on record.

Statement of Prem Lal (PW-5) as has already been noticed does not prove the case of the prosecution and in any case does not

inspire confidence. In fact the Court below had put the following questions, to which there was no satisfactory answer:-

Q. Look, you were asked to cut the wood by Mushu and not by Narinder. What you have to say?

Ans. It is correct. Mushu had said. I used to work with Mushu, in other words, it was Mushu only who used to get the work done from me. It is correct that on that day Tek Ram was not on work with me.

Q. Just now you stated that you were asked by Narender to cut the wood, and now you are saying that Mushu had asked you to do so. The second thing is that firstly you stated that Tek Ram also cut the trees and now you are staying that Tek Ram was not there. Tell which of the statements is correct.

Ans. The witness has no answer. He kept mum.

For the aforesaid reasons, I am of the view that evidence of the prosecution is replete with inconsistencies, infirmities and no implicit reliance can be placed on the testimony of the witnesses. Their statements raise a doubt and suspicion with regard to the presence of the policy party at the place of incident itself, the presence of the accused persons and the occurrence of the alleged incident itself.

In my view, there is no perversity in the findings of the Court below. The judgment is well reasoned and based on cogent material on record. In the facts and circumstances of the case, the exercise of power by this Court for reversing the order of acquittal is not warranted.

For all the aforesaid reasons, the appeal is dismissed.

11th September, 2007 (Sanjay Karol),
(C) Judge.